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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 18 2006

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. According to Part 6 of the petition, the petitioner seeks employment as a postdoctoral research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence that relates to events after the date of filing. For the reasons discussed below, we concur with the director that the petitioner has not established eligibility as of the date of filing.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Materials Science and Engineering from Iowa State University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, development of alloys and superalloys, and that the proposed benefits of his work, more effective and longer-lasting coatings and more accurate lifetime assessments, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or

training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner relies on the submission of several letters, including those from independent members of the field. The director considered the letters but concluded that while the authors provided general accolades, they did not claim to have been influenced by the petitioner's work. The director noted that the general accolades were not supported by citations or first hand accounts from research teams applying the petitioner's work. On appeal, counsel implies that the director erred in failing to "defer" to the expert opinions represented in the witness letters and requiring that the independent evidence take a particular form. Throughout the proceedings, counsel has relied on non-precedent decisions issued by this office. Such decisions have no legal authority in future matters. *See* 8 C.F.R. § 103.3(c).

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, as implied by the director, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

Moreover, counsel mischaracterizes the director's decision as requiring that the independent evidence take a specific form. The director provided at least three examples of the type of independent evidence that might have bolstered the petitioner's claims: official recognition,

citations, and "first-hand accounts describing how laboratories or research teams altered their procedures, goals or focus due to the petitioner." While not a precedent decision, it is worth noting that one of the AAO decisions provided by counsel on appeal is in accord with the director's decision in this matter. The 2004 AAO decision provided by counsel states:

> Independent evidence of the important of the petitioner's work can take a variety of forms. Letters from top officials of national organizations or agencies, written on behalf of those entities, would obviously carry significant weight. It would be arbitrary, however to require that independent evidence must take the form of endorsements from national bodies or government offices. Depending on a given alien's field of endeavor, other evidence can satisfactorily show impact in the field. *If the alien has written scholarly articles, heavy independent citation (as opposed to self citation) of those articles would be objective evidence that other researchers have relied upon the alien's work. For an alien who holds one or more patents, evidence of significant implementation of the patented innovation should be considered.*

(Emphasis added.) In this matter, the director expressly found that the record contained neither citations nor evidence of implementation of the petitioner's innovative work as of the date of filing. We will evaluate the evidence below.

The petitioner obtained his Master's degree in Materials Science and Engineering at Wuhan University in 1994. He then worked as a scientist and deputy director of the Metal Research Division at the North China (Beijing) Electric Power Research Institute through 1998. As stated above, the petitioner obtained his Ph.D. in 2003 from Iowa State University and, as of the date of filing, was working as a postdoctoral research associate at the Ames Laboratory, operated by Iowa State University on behalf of the U.S. Department of Energy.

The petitioner submitted what he claims is a Science and Technology Achievement Award. The document, dated May 8, 1993, is titled: "Appraisal Certificate of Science and Technology Achievement" and provides an expert peer review of a grinding ball. The appraisal recommends replacing current grinding balls with the ones discussed in the appraisal, but makes no mention of an award placement or grade. The petitioner is listed as one of five principal investigators. The petitioner was a graduate student at the time. Without a letter from the petitioner's academic advisor discussing the petitioner's role on this project and additional evidence as to the significance of such an appraisal, we cannot evaluate the significance of the petitioner's role with this project and the project's ultimate significance.

Dr. [redacted] Director of Materials and Engineering Physics and Ames Laboratory, discusses several other of the petitioner's achievements before entering the United States, such as attending a conference in 1997, being invited to lead a major rewrite of regulations regarding lifetime assessment of high-temperature materials in electric power plants and serving as a reviewer for a journal. Dr.

[redacted] a Senior Scientist at Ames Laboratory, makes similar assertions. Neither Dr. Gleeson nor Dr. [redacted] asserts that he has any first hand knowledge of the petitioner's achievements in China.

The regulation at 8 C.F.R. § 103.2(b)(2) permits a petitioner to rely on affidavits only after showing that primary and secondary evidence is unavailable or does not exist. Affidavits should be from individuals with "direct personal knowledge of the event." The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of an alien's experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s). We do not read the regulation at 8 C.F.R. § 204.5(g)(1) to permit current employers to verify past employment with other employers. Rather, the verification must come from the employer who has first hand knowledge of the employment. Thus, while we do not question the credibility of Dr. [redacted] or Dr. [redacted] the regulations cited above strongly suggest that affidavits from those without personal knowledge have little evidentiary value. The record lacks confirmation of the overseas achievements listed in the letters for Dr. [redacted] and Dr. [redacted] For example, the record lacks letters from the petitioner's former colleagues in China and editors of the journals the petitioner served or a copy of the new regulations crediting the petitioner. Without such corroboration, the assertions of Dr. [redacted] and Dr. [redacted] have little evidentiary value.

Dr. [redacted] also provides a detailed discussion of the petitioner's work at Iowa State University and Ames Laboratory. Dr. [redacted] explains that while previous research had established the significance of small changes in minor elements individually on high temperature cyclic oxidation resistance of iron-based chromia-forming alloys, the petitioner discovered the interactive effect. Thus, he showed that high temperature oxidation behavior can be significantly improved through combinations of small changes.

The petitioner also developed a lifetime prediction model to assess high-temperature oxidation resistance of *complex* commercial chromia-forming alloys, whereas previous models addressed only simple alloys. Dr. [redacted] explains that this model is significant because it allows engineers to set service lifetimes that are not too short and without continual monitoring.

Finally, the petitioner "produced the world's first demonstration of a novel gamma prime plus gamma PtHf-modefied NiA1 coating." Dr. [redacted] explains that the petitioner's coating *process* extends the life of jet engine blades five fold. While Dr. [redacted] asserts that this work resulted in a patent application, he does not assert that the military or any airplane manufacturer has expressed interest in licensing the patent.

Initially, the petitioner submitted several additional letters from other members of his field with whom he has not collaborated. Dr. [redacted] Distinguished Staff Member in the Metals and Ceramics Division of the Oak Ridge National Laboratory, knows of the petitioner's work through his interactions with Dr. [redacted] and the others have met the petitioner at conferences. All of the references base their opinion on a review of the petitioner's curriculum vitae and publications. While they provide general praise, as noted by the director, none of them affirm applying the petitioner's work in their own laboratory.

In response to the director's request for additional evidence, the petitioner submitted three additional letters from independent members of the field. All three have impressive credentials. Their focus, however, is the significance of work that had yet to be disseminated in the field as of the date of filing. While we recognize that intellectual property rights considerations may legitimately delay publication of findings, the petitioner and his colleagues had not even filed a patent application for this work as of the date of filing. Moreover, an alien cannot secure a national interest waiver simply by demonstrating that he holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7.

The petitioner submitted the patent application and what appear to be multiple versions of a press release from Ames Laboratory. These items postdate the filing of the petition. While the petitioner is listed on the patent application, the press release names only Dr. [redacted] and Dr. [redacted] Not only does the release not name the petitioner, it makes no mention of any other researchers or a research team. The release specifies, "*the two researchers* found that platinum additions significantly improved the oxidation of nickel-rich bulk alloys having the same type of structure as the turbine alloy." (Emphasis added.) The release further provides: "*The two researchers* have recently demonstrated that their new coatings can offer significant benefits over current state-of-the-art bond coatings used in advanced TBC systems." (Emphasis added.) Moreover, in the release, Dr. [redacted] redits Dr. [redacted] with the "intuition to sprinkle either zirconium or hafnium," the factor that reduced oxidation rates to the lowest reported. The addition of zirconium or hafnium appears unrelated to the petitioner's coating *process*, the factor Dr. [redacted] dentifies in his letter as resulting in a longer service lifetime.

The petitioner also submitted e-mail requests for reprints or data and e-mail discussions of tests of the coatings on which the petitioner worked. The requests for reprints and data predate the filing of the petition. Such requests, however, reflect only a preliminary interest in the work. Citations are far more persuasive as they demonstrate actual reliance on the petitioner's work. Moreover, science involves the constant contribution of new information to the general pool of knowledge. The petitioner has not demonstrated that a handful of inquiries into his work are noteworthy. Similarly, while the petitioner submitted information indicating that his August 2004 article, apparently published after the date of filing as it was not included initially, has generated an impressive number of downloads, the record lacks evidence that this interest resulted in actual application of his work. All but one of the industry e-mail discussions regarding testing of the coating postdate the filing of the petition. The 2004 e-mail notice from [redacted] Materials Engineer at [redacted] Corporation, makes no mention of the results of its testing. The record does not include a reference letter from Mr. [redacted] or anyone else at Rolls-Royce explaining the significance of the tested coating.

The director noted that the Ames Laboratory press release makes no mention of the petitioner. The director further concluded that evidence of achievements after the date of filing could not be considered. The director relied on *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971) and *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). On appeal, counsel references a new letter from Dr. [redacted] asserting that while the petitioner is not mentioned in any of the publicity, he

played a significant role in the research. Counsel further asserts that the petitioner is not amending his claim to eligibility; rather, he is submitting evidence that corroborates the testimony submitted initially. In this context, the petitioner also submits evidence that R&D Magazine recognized the "Novel High-Temperature Coatings with Pt-Modified Ni and Ni3A1 Alloy Compositions," credited to Dr. [redacted] and Dr. [redacted], with one of at least 11 awards issued in the materials category.

In his most recent letter, Dr. [redacted] asserts that while citations constitute a tangential reference to the cited work, reference letters are focused specifically on the petitioner's work. Thus, Dr. [redacted] implies the letters submitted should be considered more persuasive than citations. We disagree. First, the letters submitted do not provide evidence that the petitioner's work is having a noticeable impact as none of the authors affirm relying on the petitioner's work in their own laboratories. Rather, they are simply forming an opinion on the work based on their review of the petitioner's curriculum vitae and articles. Frequent and wide citation is evidence that the work is being applied and built upon. Being singled out in a review article that has undergone peer-review is also evidence that the community as a whole finds the work noteworthy.

Dr. further asserts that while the petitioner was not mentioned in the publicity, his work was vital to the project because he designed the method of coating. The publicity materials and the R&D award, however, do not suggest that the new coating is significant because of its new method of being applied as opposed to its composition.

Finally, the assertion that the evidence submitted in response to the request for additional evidence and on appeal simply corroborates claims made initially is not persuasive. The petitioner must demonstrate a track record of success with some degree of influence on the field as a whole. We will not separate this concept such that a petitioner who has a track record deemed promising by a handful of experts may secure a priority date based on the speculation that the work will prove influential in the field later the proceeding. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. at 49. We cannot consider "facts that come into being only subsequent to the filing of a petition." *Matter of Izummi,* 22 I&N Dec. at 176 (*citing Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981).

While citations published after the date of filing may serve as evidence of the continued relevance of an alien's work that had already been well cited as of the filing date, post filing industry testing of an innovation for which the petitioner's had not even applied for a patent as of the date filing cannot be considered evidence that the alien was already influential as of that date.

While the petitioner has published useful research and is listed on a patent application, it can be argued that the petitioner's field, like most science, is research-driven, and there would be little point in publishing research which did not add to the general pool of knowledge in the field. Similarly, it is not clear that everyone who has filed a patent application for a useful invention inherently qualifies for a national interest waiver of the job offer requirement. The record lacks evidence that, as of the date of filing, the petitioner's work was influential in the field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.